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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 74-1430

COPY

GLORIA SANDQUIST,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF THE STATE OF
CALIFORNIA FOR THE COUNTY OF
LOS ANGELES

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

I.

OPINION BELOW

The Petition correctly sets forth the orders below and the absence of an opinion therein.

II.

JURISDICTION

The jurisdictional requisites are adequatedly set forth in the Petition.

III.

QUESTIONS PRESENTED

A. DOES THE PETITION PRESENT ANY SUBSTANTIAL FEDERAL QUESTIONS?

B. DO THE CONVICTIONS HEREIN REQUIRE REVERSAL FOR INSUFFICIENT SPECIFICITY IN EITHER THE GOVERNING LAW OR THE JURY INSTRUCTIONS?

1. The Governing Law
2. The Jury Instructions

C. IS THERE ANY "EX POST FACTO" PROBLEM IN THE CASE AT BAR BY VIRTUE OF ALLEGED RETROACTIVE APPLICATION OF MILLER STANDARDS?

1. Was there Retroactive Application?
2. If so, was there "Ex Post Facto" Effect?

D. IS EXHIBITION OF OBSCENITY TO CONSENTING ADULTS CONSTITUTIONALLY PROTECTED?

E. DO THE CONVICTIONS REQUIRE REVERSAL FOR USE OF JURY INSTRUCTIONS DEFINING THE APPLICABLE COMMUNITY AS THE

STATE OF CALIFORNIA?

F. DOES DUE PROCESS MANDATE THAT A MISDEMEANOR DEFENDANT BE GIVEN A FREE TRANSCRIPT REGARDLESS OF LACK OF INDIGENCY OR THE AVAILABILITY OF A SETTLED STATEMENT FAULTED ONLY IN THAT IT DID NOT AGREE WITH THE DEFENSE VERSION?

IV.

STATUTES INVOLVED

The pertinent provisions of the California obscenity statute are set for in the Petition at pp. 6-8.

V.

STATEMENT OF THE CASE

The statement of the case is adequately set forth in the Petition except as to its omission of the following:

"I-THE COURT REPORTER

"At the outset of the trial the court announced that no reporter was assigned to the court, or any division thereof except when preliminary hearings were held. The court further stated to both counsel

that if they desired a Court Reporter they were permitted to employ at their own expense any reporter they wished. Defendant did in fact employ a reporter of his own choosing who was present at all times court was in session.

"Subsequent to the trial, defendant's counsel stated to the court that his client could not advance the estimated $2000 necessary for the transcript. A Motion was made by defendant that the court order the Reporter's Transcript prepared without cost to the appellant. Defendant's counsel stated he could not represent that defendant was indigent. The Court requested defendant to furnish a financial statement, but this was refused. Defendant's counsel informed the court that defendant owned the realty on which the Kozy Kitten was located and that she owned a bar in Downey. The Probation Report showed the defendant stated she had a gross income of $4000 per month. During the trial Mr. Lynch,

a reporter for the Long Beach Press Telegram, testified under oath that he interviewed the defendant and that she stated to him she had a gross income of $100,000 annually with a net of $80,000. This admission was not denied at any time. Defendant did not testify at the trial. The court denied the motion." (Engrossed Statement on Appeal[1], pp. 2-3.)

VI.

ARGUMENT

A.

AS WILL BE MORE PARTICULARLY SHOWN INFRA, THE PETITION DOES NOT PRESENT ANY SUBSTANTIAL FEDERAL QUESTION

As we will show **infra**, as to each of Petitioner's contentions. This does not appear to be a case "[w]here a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

---

1. Hereinafter E.S.S.A.

(See Rule 19(1)(a) Supreme Court Rules) In fact, as to the obscenity issues, the precise contentions raised by Petitioner herein have ea been explicity settled to the contrary by this court. Petitioner's remaining contention (that a free transcript is required despite lack of indigency) has been impliedly settled against her in such cases as Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956), and Mayer v. Chicago, 404 U.S. 189, 30 L.Ed.2d 372, 92 S.Ct. 410 (1971).

B.

THE CONVICTIONS HEREIN DO NOT REQUIRE REVERSAL FOR INSUFFICIENT SPECIFICITY IN EITHER THE GOVERNING LAW OR THE JURY INSTRUCTIONS

1. The Governing Law

Petitioner's complaint that "the specificity required by the Miller test is not present under the California [obscenity] statute... [Pen. C § 311.2]" (Petition at p. 17) overlooks the fact (as held in People v. Enskat, 33 Cal.App. 3d 900, 908-909,) that pre-existing California decisions (see e.g., Zeitlin v. Arnebergh, 59 Cal.2d 901, 908, 909, 911-

912 (1963); and People v. Noroff, 67 Cal.2d 791, 794 and fn. 6) had already limited California prosecutions to the specific types of material contemplated in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Furthermore, this court itself in Miller v. California, 418 U.S. 915, 94 S.Ct. 3206, 41 L.Ed.2d 1158 (1974) (Miller II), dealth with the merits of a similar challenge to the California obscenity statute "by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one" (Hicks v. Miranda, ____ U.S. ____, ____ L.Ed.____, 95 S.Ct. 2281, 2289 (1975)).

In Hamling v. United States, ____ U.S. ____, ____ L.Ed. ____, 94 S.Ct. 2887, 2904-5 (1974) this court replied to a similar challenge to a federal statute by referring to its previous vindication in Roth v. United States, 254 U.S. 476, 491, 77 S.Ct. 1304, 1312, 1 L.Ed.2d 1498 (1957), a case which had also upheld the validity of the less precise predecessor to California Penal Code § 311.2 (Roth, supra, 354 U.S. 476, 492; 1 L.Ed.2d 1498, 1511 (1957)).

As Hamling notes, this Court in Miller I did not intimate that the constitutionality of pre-Miller convictions (such as that at bar) was to be cast in doubt but "Indeed, the contrary is readily apparent from the opinions in those cases" (Hamling, supra, ____ U.S. ____, 94 S.Ct. at 2905)

2. The Jury Instructions

This court stated in Hamling, (supra, ____ U.S. ____, 94 S.Ct. at 2906) that the Miller cases "were intended neither as legislative drafting handbooks or as manuals of jury instructions." and that distributors of clear-cut "hard core" obscenity (as in the case at bar) would have no valid complaint as to the lack of a previous limiting construction (Id.).

Nevertheless, just as the governing law anticipated Miller, so also the jury was instructed in accordance with that law. Instruction No. 22 (based on Caljic [misdemeanor] 16.190) was given as follows:

> "Nudity and obscenity are not synonymous. The display, live or pictorial, of the nude human body, male or female, or both, in

the absence of depicting any sexual activity, is not legally obscene."

Instruction No. 23 (based on Caljic [misdemanor] 16.191 as modified) was given as follows:

"Sex and obscenity are not synonymous. The description or portrayal of sexual activity which does not appeal to prurient interest is not legally obscene. On the other hand, the graphic portrayal or description of sexual activity, the predominant appeal of which is to prurient interest, is one of the tests of legal obscenity."

C.

THERE IS NO "EX POST FACTO" PROBLEM IN THE CASE AT BAR

1. No Retroactive Application

Contrary to petitioner's implication, People v. Enskat, 33 Cal.App.3d 900, 908-909, did not provide a "new" construction but held instead that pre-existing California decisions (see e.g., Zeitlin v. Arnebergh, 59 Cal.2d 901, 908, 909, 911-

912 (1963); and People v. Noroff, 67 Cal.2d 791, 794 and fn. 6) had already limited California prosecutions to the specific types of material contemplated in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

2. In Any Case A New Limitation on Prosecution Would Be The Opposite Of An "Ex Post Facto" Evil

Even if this court were to disregard state court determinations as to previous statutory construction with its jurisdiction (as exemplified by Enskat, supra) it would still be open to California courts to now place such a gloss on the statute and apply such construction to the material and conduct at bar. (See Dombrowski v. Pfister, 380 U.S. 479, 491, n. 7, 85 S.Ct. 1116, 1123, 14 L.Ed.2d 22, 31 (1965) [a First Amendment case], Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) [a First Amendment case], United States v. Thirty-Seven Photographs, 402 U.S. 363, 374, n.3, 91 S.Ct. 1400, 1406, 28 L.Ed.2d 822, 833 (1971) [an obscenity case].). Although such retroactive application

is impermissible where an act is made punishable by means of an unforeseeable judicial enlargment of a pre-existing statute (Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894), we have here a narrowing of the statute by constitutional limitation. Thus it would seem that petitioner lacks standing to complain since any retroactive effect as to specificity would be beneficial to her and no different as to the social value test (Because she still has the advantage of the California statute's facially more stringent requirement). In any case, one whose conduct is "hard core" lacks standing to complain of retroactive application of a new judicial construction. (Dombrowski, supra, 380 U.S. 479, 491; Broadrick v. Oklahoma, supra, 413 U.S. 601).

An "ex post facto" contention similar to that of appellant herein was rejected by this Court in Hamling v. United States, supra, at 94 S.Ct. 2906-2907, noting that Miller's enumeration of specific categories of material which might be found obscene "did not purport to make criminal... conduct which had not previously been thought criminal", but "instead added a 'clarifying

gloss' to the prior construction", making its meaning more definite. (Hamling, supra, ____ U.S. at ____, 94 S.Ct. at 2907.)

D.

EXHIBITION OF OBSCENITY TO CONSENTING ADULTS IS NOT CONSTITUTIONALLY PROTECTED

Petitioner's "consenting adults" immunity contention was already thoroughly demolished in Miller's companion case, Paris Adult Theatre I v. Slaton, 413 U.S. 49; 93 S.Ct. 2628; 37 L.Ed.2d 446 (1973) at 93 S.Ct. 2641.

E.

THE CONVICTIONS DO NOT REQUIRE REVERSAL FOR USE OF JURY INSTRUCTIONS DEFINING THE APPLICABLE COMMUNITY AS THE STATE OF CALIFORNIA

Petitioner's contention to the contrary notwithstanding, in rejecting the view that the First and Fourteenth Amendments require nationwide standards of what is obscene, this Court

"did not require as a constitutional matter the substitution

of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of 'the average person, applying contemporary community standards.' 413 U.S., at 24, 93 S.Ct., at 2615. When this approach is coupled with the reaffirmation in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56, 93 S.Ct. 2634, 37 L.Ed.2d 446 (1973), of the rule that the prosecution need not as a matter of constitutional law produce 'expert' witnesses to testify as to the obscenity of the materials, the import of the quoted language from Miller becomes clear. A juror is entitled to draw on this own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law. Stone v. New York, Chicago & St. Louis R. Co.,

344 U.S. 407, 409, 73 S.Ct. 358, 359, 97 L.Ed. 441, 445 (1953); Schulz v. Pennsylvania R. Co., 350 U.S. 523, 525-526, 76 S.Ct. 608, 609-610, 100 L.Ed. 668, 671 (1956). Our holding in Miller that California could constitutionally proscribe obscenity in terms of a 'statewide' standard did not mean that any such precise geographic area is required as a matter of constitutional law." (Hamling, supra, ____ U.S. at ____, 94. S.Ct. at 2901.)

In other words the very "statewide" standard which petitioner asserts to be unconstitutional, was specifically held permissible in Miller and Hamling, (id.).

F.

DUE PROCESS DOES NOT MANDATE THAT A MISDEMEANOR DEFENDANT BE GIVEN A FREE TRANSCRIPT WITHOUT REGARD TO LACK OF INDIGENCY OR THE AVAILABILITY OF A SETTLED STATEMENT

Petitioner is, in effect, asserting the right of a non-indigent to a free

transcript. In Griffin v. Illinois, 351 U.S. 12, 17, 76 S.Ct. 585, 100 L.Ed. 891, 898 (1956) this court stated,

> "Both equal protection and due process emphasize the central aim of our entire judicial system -- all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' (citations omitted)"

The evil to be corrected was a system "which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance" (Griffin, supra, 351 U.S. at 18, 100 L.Ed. at 898). Non-indigents, therefore, not being deprived of the means to an adequate appellate reivew have no claim to a free transcript. Since "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all" (Griffin, supra, 351 U.S. at 18, 100 L.Ed. at 898), a non-indigent able but unwilling to pay for his transcript is left by that same Constitution to whatever alternative the state may provide.

Here, despite his client's demand for a free transcript, petitioner's counsel frankly stated that he could not represent that petitioner was indigent. (E.S.S.A., p. 2) Evidently, the only impediment to a transcript was petitioner's unwillingness (but not inability) to pay for it herself. The only fault she finds with the Engrossed Settled Statement is that it "differed in material respects" from her own version (Petition at p. 11)[2/].

In his concurring opinion in Mayer v. Chicago, 404 U.S. 189, 30 L.Ed.2d 372 (1971), Mr. Chief Justice Burger noted the

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2. Following Mayer v. Chicago, 404 U.S 30 L.Ed.2d 372, 92 S.Ct. 410 (1971) Californ requires free transcripts for misdemeanor defendants upon a prima facie showing of indigency "unless the court has good reason to doubt the truthfulness of the allegations" in which event further deliberation is required. (March v. Municipal Court, 7 Cal.3d 422, 429). However, where a non-indigent (as here) is unwilling to avail himself of a transcript and fails to convince the trial judge that his proposed statement is correct the finally settled version of the trial judge, who heard and tried the case, must be regarded as final (Burns v. Brown, 27 Cal.2d 631, 636) provided defendant had a chance to present his version and participate in the settlement proceedings (In re Finn, 54 Cal.2d 807, 814-815) apparently not disputed here.

dilatory potential of excessive demands for free transcripts by indigents. How much more applicable is that here where indigency is not even involved. According to the municipal court dockets in one of these matters ligitation commenced in May, 1970 over five years ago, and has not yet been concluded (docket M-38945). Provision of free transcripts to non-indigents could

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only unnecessarily increase the burden on the strained criminal justice system as well as the overtaxed public.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN E. HOWARD
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By

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

I, the undersigned affiant, hereby declare under oath that the following is true and correct:

I am a citizen of the United States, over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County, with principal offices located at 18000 Criminal Courts Building, Los Angeles, California 90012; that the District Attorney is the attorney for the respondent in Gloria Sandquist v. The State of California, No. 74-1430. On August 11, 1975, I served the foregoing BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES on Mr. Irving A. Kanarek, attorney for petitioner in said action, by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail in the City of Los Angeles, California, addressed to his office as follows:

Mr. Irving A. Kanarek, Esq.
14167 Victory Boulevard, Suite One
Van Nuys, California 91404

Three copies were also sent to:

Appellate Department of
the Superior Court
Room 607 Courthouse
Los Angeles, CA 90012

Clerk, Los Cerritos
Municipal Court
10025 East Flower Avenue
Bellflower, CA 90706

Jo Kaufman

Subscribed and sworn to before me this 11th day of August, 1975, at Los Angeles, California.

OFFICIAL SEAL
M. LITENBERG
Notary Public - California
LOS ANGELES COUNTY
My Commission Expires June 29, 1978

M. LITENBERG, notary Public
of the State of California
for the County of Los Angeles